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In The
Supreme Court of the United States

OCTOBER TERM, 1967

No. 1085

CHYRL MERTH (OVENS) ALLISON, *Petitioner*

v.

JAMES M. OVENS, JR., *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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OPINIONS BELOW

The opinion of the Court of Apppeals of the State of Arizona, Division One, is reported at 4 Ariz. App. 496, 421 P.2d 929, and the affirming opinion of the Supreme Court of Arizona is reported at ____ Ariz. ____, 433 P.2d 968.

JURISDICTION

The judgment from the Supreme Court of the State of Arizona in controversy is not reviewable because the decision rests on non-federal grounds. The attempt to invoke jurisdiction under 28 USCA § 1257(3) upon the asserted grounds that "a right, privilege and immunity was claimed under the Constitution of the United States" and was denied by the court below (Petition p. 3) is rendered insubstantial because the state court decisions demonstrate that the change of custody of the minor children involved in this case was made and based upon a finding that:

> *"The evidence was more than sufficient from which the trial court, disregarding any evidence of religious attitudes on church attendance, could find that the best interests of the children dictated a change in custody."* (Emphasis supplied).

See 421 P.2d 929, at 936. A state court judgment based upon an adequate and independent non-federal ground even though a federal question may be involved and perhaps wrongly decided, will not be reviewed. *Murdock v. Memphis,* 20 Wall 590, 22 L.Ed. 429; *Berea College v. Kentucky,* 211 U.S. 45, 53 L.Ed. 81; *Fox Film Corp. v. Muller,* 296 U.S. 207, 80 L.Ed. 159, 56 S.Ct. 183. Where state court decisions are predicated on non-federal grounds entirely independent of any federal issue, jurisdiction is defeated; see *Cramp v. Board of Public Instruction,* 368 U.S. 278, 7 L.Ed.2d 285, 82 S.Ct. 275, and also *Jankovich v. Ind. Toll Road Comm.,* 379 U.S. 487, 13 L.Ed.2d 439, 85 S.Ct. 493, and see the prodigious number of cases annotated under 28 USCA § 1257 pp. 200-205 which section Petitioner ironically seeks to utilize in invoking jurisdiction.

QUESTIONS PRESENTED

Respondent restates the real questions before this Court:

1. Will certiorari issue to review a state court decision affirming an order changing the custody of minor children upon non-federal grounds that such change was in the best interests of the children in order to protect their health, morals and welfare?

2. Is the evidence of the moral and mental unfitness of Petitioner dictating the change of custody of the minor children adequate to support the state court decision?

STATEMENT OF THE CASE

Petitioner's statement of the case is in most serious need of correction in that it reflects a studied endeavor to omit all facts other than those concerning certain religious aspects, whereas in truth and in fact the decision turned on almost overwhelming evidence to the effect that it was to the best interest of the minor children involved in this proceeding that a change of custody be made for the protection of their health, morals and welfare.

A casual perusal of the state appellate court opinion (A. 12-24) and the unchallenged findings of fact and conclusions of law and judgment entered thereon (A. 1-6) will place in proper focus

the facts chiefly relied upon to remove the young boys from Petitioner's custody. She has twice remarried since her divorce from Respondent. Both new husbands have long and involved criminal records. Evidence was adduced establishing the detrimental influence of these men on the minor children of the parties. (A. 17) The record shows that Petitioner frequently drank to excess both in public and in her home; (A. 2, 20, 21) her neighbors testified that Petitioner maintained a "messy" home and observed her on one occasion standing on the hood of her automobile clothed in a nightgown screaming "just noises", then toppling to the ground necessitating assistance from her minor daughters. (A. 21) Petitioner was often observed in public in various stages of inebriation, using profane language. Her eight year old son undoubtedly influenced by Petitioner's profanity also was given to the repeated use of "four-letter" words. (A. 22) Petitioner was also given to bizarre and lascivious conduct such as tying a blue ribbon on the exposed penis of her eight year old child. (T.R. p. 624, 625) Petitioner's present husband was shown to have embarked on the practice of attending nightclubs with, and was observed on one occasion fondling the breasts of, the eighteen year old daughter of the parties hereto. (A. 18-21)

A Phoenix psychiatrist agreed upon by both parties, examined Petitioner and concluded that it was "disadvantageous for her to be around the children," and further, "she was of an emotionally unstable personality" and "if her condition is reversible at all, it would take a long period of time, five to ten years, which does not give much time for improvement in the presence of young children" (A. 21, t.r. pp. 213, 237). A former teacher of one of the minor boys testified that when the child lived with Petitioner his grades were exceptionally low and that he was emotionally unstable, often physically ill, and frequently trembled and cried when forced to return to the home of the Petitioner; that on one occasion Petitioner ordered the child to walk some fifty-nine blocks home from school as punishment (t.r. pp. 171, 179, 184, 189).

Conversely, the trial court found as a fact that the Respondent had remarried a highly respected widow who maintained an

orderly home and was devoted to the Ovens children. The court further found that the environment of Dr. Ovens' home was conducive to a wholesome life for the minor children, and further, that they were assisted with their school work, well groomed, and adequately clothed, as opposed to the children's plight when forced to live with Petitioner. (A 1, Finding of Fact [a, b, f, i]), and also A-20 of state court opinion).

REASONS FOR DENYING THE WRIT

Given the fact that the evidence supports a finding that Petitioner was an unfit and improper person to have custody of the minor children of the parties it will appear that the state court decisions were and are correct. The Arizona courts have uniformly held that the sole question for decision on a petition for change of custody is the "best interests" of the children. In this the trial court exercises wide discretion. See *In re Guardianship of Rodgers,* 100 Ariz. 269, 413 P.2d 744; *Andro v. Andro,* 97 Ariz. 302, 400 P2d 105. The Arizona appellate courts will not interfere with the trial judge's judgment regarding a change of child custody unless a manifest abuse of discretion is shown. *Ward v. Ward,* 88 Ariz. 130, 353 P.2d 895; *Bailey v. Bailey,* 3 Ariz.App. 138, 412 P.2d 480; *Grimditch v. Grimditch,* 71 Ariz. 237, 226 P.2d 142; *Gotthelf v. Gotthelf,* 38 Ariz. 369, 300 Pac. 186; *McFadden v. MvFadden,* 22 Ariz. 246, 196 Pac. 452; *Bradstreet v. Bradstreet,* 34 Ariz. 340, 271 Pac. 717. See also *Keezer, Marriage and Divorce,* 3rd Ed. § 725 and *Tiffany on Domestic Relations,* p. 350.

In order to insure the welfare of children after entry of a decree of divorce, the Arizona law gives the court continuing jurisdiction in custody cases; A.R.S. § 25-321:

> "The court may from time to time after entry of final judgment, on petition of either party * * * amend, change or alter any provision of the judgment respecting the care, custody or maintenance of the children of the parties as circumstances of the parents and welfare of the children require."

The decision of the Arizona Court of Appeals (affirmed on this point by the Supreme Court of the State of Arizona) com-

pletely dispells the question raised by the Petitioner to the effect that only "a religious issue" was considered, see *Allison v. Ovens,* 421 P.2d 929, at 935:

> "Even assuming arguendo that the question concerning the parochial school and church attendance of the minor children may not be considered, *the examination of the record indicates that at most this is a peripheral issue.*" (Emphasis supplied)

It is made abundantly clear that the decision affirming the change of custody was and may be sustained solely upon the grounds that the health, morals and welfare of the children demanded such change entirely independent of any constitutional rights, privileges or immunities. This court has never rendered an advisory opinion. If, after review correcting any claimed infringement of a constitutional right or privilege, the same judgment (i.e. changing the custody of the minor children from Petitioner to Respondent herein) could result, said review would amount to nothing more than an advisory opinion, *Herb v. Pitcairn,* 324 U.S. 117, 89 L.Ed. 789, 65 S.Ct. 459, and this destroys jurisdiction.

The entire record amply demonstrates that Petitioner has embarked upon a course of conduct which the Arizona courts have found inimical and detrimental to the best interests of the minor children of the parties. Even Petitioner's recital of the history of this case reveals that the court was compelled to remove other minor children from Petitioner's custody. Her attitude, activities, and conduct both inside and outside of the family home establish Petitioner as an unfit person to have custody. On this basis every case cited by Petitioner is made inapplicable; first, because this case is merely a domestic relations matter affecting only the private interests of the parties in which the state courts have recognized that the health, welfare, morals and best interests of the children would be served by removing them from the custody of the Petitioner—this is an area of litigation which this court has rarely, if ever, entered; second, it should be observed that each Federal case cited was decided exclusively upon the grounds that there existed an unwarranted intrusion by a state

or municipal body, into the rights of others protected by the First and Fourteenth Amendments of the United States Constitution; further each state court decision cited reveals that the wife was conceded to be a fit and proper person to have custody of the children, the only controversy appearing was the question of religious training. For example, see *Stanton v. Stanton* (Ga.) 100 S.E.2d 289, at 292; *McLaughlin v. McLaughlin* (Conn.) 132 A.2d 420, at 421; *Hackett v. Hackett* (Ohio) 150 N.E.2d 431, at 434.

In the instant case the evidence warrants a finding that the mother (Petitioner) was and is morally unfit and mentally unsuitable to have the custody of the children. The fact that the Arizona courts have observed and make mention that these children were not getting any religious training whatsoever does not warrant review. Petitioner has simply been found lacking as a parent. See *Schreifels v. Schreifels,* 47 Wash.2d 409, 287 P.2d 1001. The petition does not disclose any public interest to be affected.

CONCLUSION

The Petitioner has demonstrated no reason whatsoever why this Court should return to her the custody of the minor boys. It affirmatively appears that Petitioner does not raise any adequate federal ground which may be said to have controlled the state courts' decision to remove the children from her custody. It is therefore respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I Hereby Certify that three true copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari were delivered to John J. Dickinson, Esq., 224 Luhrs Building, Phoenix, Arizona, 85003, this ____ day of March, 1968.

Mark Wilmer
Attorney for Respondent